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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. KEVIN KEITH SELLERS, JR. Defendant and Appellant.	D058346 (Super. Ct. No. SCD216892)

APPEAL from a judgment of the Superior Court of San Diego County, Charles G. Rogers, Judge. Affirmed.

A jury convicted Kevin Keith Sellers, Jr. of five counts of robbery (Pen. Code,[1] § 211); one count of burglary (§ 459); five counts of assault with caustic chemicals (§ 244); five counts of making criminal threats (§ 422); one count of forcible rape (§ 261, subd. (a)(2)); one count of forcible rape while acting in concert (§ 261, subd. (a)(2)); and one count of attempted sodomy by use of force (§§ 286, subd. (c)(2); 664).

1 Statutory references are to the Penal Code unless otherwise stated.

The jury found true allegations that the robberies were of the first degree and of an inhabited residence (§ 212.5, subd. (a)), Sellers acted in concert with two or more persons (§ 213, subd. (a)(1)(A)), and he personally used a firearm (§ 12022.53, subd. (b)); the burglary was of the first degree, of a residential building, and Sellers personally used a handgun in its commission (§§ 460, 12022.5, subd. (a)); in making the criminal threat, he personally used a firearm (§ 12022.5, subd. (a)); the rape and rape in concert were committed during the commission of a burglary (§ 667.61, subds. (b), (c), (e)(2)), in concert with another person (§ 667.61, subds. (b), (c), (e)(8)), and he was vicariously armed (§ 12022.53, subd. (b)); and when Sellers committed the rape in concert, he engaged in tying or binding the victim (§ 667.61, subds. (b), (c), (e)(6)), and personally used a firearm (§ 667.61, subds. (b), (c), (e)(4)).

The court dismissed the conviction for forcible rape as being a lesser included offense of the forcible rape in concert conviction and sentenced Sellers to an aggregate term of 76 years and four months to life as follows: a determinate term of 51 years and four months, plus a consecutive indeterminate term of 25 years to life.

Sellers contends: (1) there was insufficient evidence to support his conviction for forcible rape in concert; (2) the court prejudicially erred by failing to instruct the jury regarding aiding and abetting as to forcible rape in concert, thus depriving him of his rights to due process and a fair trial; (3) the trial court prejudicially erred in denying his new trial motion brought on grounds of juror misconduct. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution Case

On October 17, 2008, at approximately 8:30 p.m., Yoshi Nguyen was at the home where he rented a room from K.D. and his wife, H.P. Two men armed with guns, Tommy Nguyen[2] and Sellers, arrived at the house. They saw Yoshi, covered their faces, and ordered him to be quiet and turn around. They forced Yoshi into a back living room, covered his head with fabric, tied his hands behind his back, tied his feet, and forced him to lie on the floor. One man put a gun to Yoshi's head and threatened to shoot him. The gunmen covered Yoshi's head with another material to further prevent him from seeing, and wrapped a metal chain around him.

Yoshi heard the gunmen round up his roommates, Tam Pham, Hung Tran, and Trieu Nguyen, who were made to lie next to him. Approximately 15 minutes later, Vanna Chheuni joined the gunmen and guarded the victims.[3] The gunmen demanded the victims' money and searched their bedrooms. Sellers or Tommy ordered Chheuni, "Keep an eye on them. They move, shoot them." Yoshi testified he believed it was more likely there were only three robbers, two males and one female.

H.P. and her husband arrived home at approximately 11:25 p.m. H.P. testified that as she entered their house, a man with his face covered pointed a gun at her, warning he would shoot her if she turned on the light. The man asked for money, grabbed her purse

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2 Yoshi, Tommy and Trieu Nguyen share the same surname; therefore, we refer to them by their first names for clarification.

3 Chheuni, who Sellers held out as his wife, was tried as Sellers's codefendant.

which contained almost $1000, pushed her to the ground, covered her head with a T-shirt, and tied her hands and feet. A second man ordered her husband into the house.

The first man, who appeared to be Asian, dragged her into the master bedroom, held her at gunpoint and raped her. H.P. was on her back and her blindfold slipped, and she managed to see the man, whose face cover was removed. When he finished raping her, he said two other men with bigger penises were waiting their turn outside. He left the room and whispered something to a second man, who entered the bedroom.

H.P. identified the second man based on his physical differences: "For one, the bathroom light was on, and I was moving my head to a degree that the T-shirt was kind of off of my face, so I could see the skin is not dark and not white, it's like half of that." Also, he tried to insert his penis, which was bigger, into her anus. He refused to stop, and slapped her face. He continued to insert his penis halfway and she screamed so loudly that he withdrew his penis. He demanded her money, asked for her safe box, and threatened to cut off her hand so she could not "work on nails anymore." She described his voice as sounding, "half Black, half Mexican."

When the second rapist left the room, she dialed 911 and left the phone off the hook.[4] Afterwards, her foot hit something that made a noise. Tommy and Sellers ran into the room and told her they were going to shoot her dead immediately. H.P. testified, "One slapped me and used the T-shirt and pushed the whole T-shirt inside my mouth.

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[4] A recording of H.P.'s 911 call was played for the jury, who heard the gunmen's voices as they told H.P. to sit down, and one man asked for his other gun.

And then one covered my head as if they were going to shoot me. They used a pillow case."

Afterwards, the gunmen herded all the victims into a room, threw gasoline on H.P., her husband and the others, and threatened to burn them if they did not give them money. One gunman said something like, " 'We are going to burn you guys. This is your last chance.' " Yoshi also heard the robbers lighting a lighter. Immediately following that, the police arrived.

Police officers testified they reached the house around 12:20 a.m. Chheuni walked out of the house and police detained her. Minutes later, Tommy walked out and fled when he saw police, but he was caught. Police also apprehended Sellers as he fled the house carrying $1200 in cash. Police found stolen cell phones, electronic equipment, including computers, jewelry and other items that the robbers carried on their persons or had set aside on the floor in the front living room. Police found a used condom near the spot where they had detained Sellers.

Danella Kawachi, a sexual assault nurse examiner, collected DNA from Sellers's mouth, penis and scrotum. David Cornacchia, a lab technician, testified that the outside of the condom had DNA matching that of H.P. and her husband, and it was inconclusive whether Sellers was a DNA contributor. The inside of the condom contained DNA matching that of H.P. and Chheuni, and that DNA was very similar to DNA taken from Sellers's penis. Any DNA from Sellers found inside the condom was relatively small compared to the DNA found matching H.P. and Chheuni. Cornacchia agreed with the prosecutor that the most likely explanation of the lab results was that "somebody used

that condom and had sex with [H.P.,] who had had sexual intercourse with her husband the day before or days before." Further, Sellers might have had sex with Chheuni recently, and her DNA remained on his penis. The relative absence of Sellers's DNA from inside the condom was partially explained because no sperm cells were found inside the condom, indicating it was unlikely Sellers had ejaculated inside it.

Defense Case

Sellers testified he had accompanied Tommy, Chheuni and a male friend of Tommy's to the house and stayed there for approximately three hours before H.P. and her husband got home.[5] Sellers did not know Tommy's friend before that day, and could not

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[5] Although Sellers claims Tommy's friend accompanied them, he could not describe the friend, despite the fact they had spent more than three hours together in the drive to H.P.'s residence and when waiting for H.P. to arrive home. Further, the trial court concluded the victims' evidence showed there were only two gunmen. In denying Sellers's new trial motion, the court stated: "Throughout the testimony of the victims, they were consistent [with] what they saw and heard. They never said that there was a third person. When the homeowners arrived to the house, they were confronted by two men with guns. [¶] There was never any talk of a third male with them. There was never any evidence of a third male with them."

During sentencing, the court also commented on Sellers's lack of credibility: "[Sellers] also was, I think, not candid and not truthful in every opportunity he had to speak about what happened that night. [¶] When he spoke to police initially, his words were untruthful, and he admitted it later on. And then his statements evolved. They reached, in this court's mind, a zenith when he testified. [¶] And I think I would be derelict if I didn't say, without trying to be provocative or belittling, the court found that Mr. Sellers's testimony was a carefully crafted fabric intended to explain away scientific evidence that, by the time he gave that testimony, he knew existed. It was almost like a pinball in a pinball machine, where it bounced from point to point to point and [he] tried to explain away each one of the scientific circumstances that would point to his culpability, certainly, of the sexual assault on [H.P.]. [¶] I find that testimony, which he was privileged not to give, is nothing less than an obstruction of justice and an aggravating factor."

physically describe him, except to note he appeared Black or Hispanic.[6] Sellers acknowledged he participated in the robbery, and a surveillance video photographed him at H.P.'s house.

Sellers denied raping H.P. or knowing about it while it occurred. He claimed to be guarding the other victims in the living room area when he heard H.P. scream as she entered the house. According to Sellers, Tommy and his friend detained H.P. and her husband on the floor, and Sellers did not see what Tommy did with H.P. afterwards, but he heard H.P. saying "not to hurt her." Sellers said Tommy's friend brought H.P.'s husband to join the other victims. Afterwards the friend left and, Sellers assumed, rejoined Tommy. Sellers asked Tommy's friend what Tommy was doing, and the friend said "not to worry about it." About 15 to 20 minutes later, both Tommy and his friend joined Sellers. However, they heard a noise coming from the master bedroom, and Tommy and his friend ran to see what was going on. Sellers followed them a few seconds afterwards, but they closed the door on him. Sellers returned to the dining room. After a while, Tommy and his friend returned to the living room and escorted the victims to the master bedroom.

Sellers admitted that before police arrived he had collected evidence of his presence in the house, including cigarette butts, bottles of alcohol he had drunk, and he had wiped the objects he had touched because he did not want to leave behind fingerprints or DNA evidence. Sellers denied knowing anything about the condom,

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6 According to the probation report, Sellers is Black and has hazel eyes.

putting it on the ground or knowing how it got there. He did not know how Chheuni's DNA got on it. He admitted having sex with Chheuni the night before the incident.

Sellers admitted that he told police who captured him, " 'You won't find my fingerprints or DNA anywhere' " in the residence. Sellers admitted lying to police to get out of trouble, including by denying having been inside H.P.'s house or knowing what had happened there. He lied by saying the money found on his person belonged to him. The prosecutor asked Sellers on cross-examination, "But as you sit here today, . . . [y]ou know fingerprints were found in the house. You know that your shoe prints were found in the house. You know that [H.P.'s] DNA was found on your penis and your scrotum. And you know that this condom was found with [Chheuni's] DNA and [H.P.'s and her husband's] DNA, correct?" He replied, "Yes."

DISCUSSION

I.

Sellers contends there was insufficient evidence to support his conviction for rape in concert.

In reviewing the sufficiency of the evidence, we ask whether, after viewing the evidence in the light most favorable to the People, any rational trier of fact could have found the essential elements of rape in concert beyond a reasonable doubt. (See *Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Maury* (2003) 30 Cal.4th 342, 403.) "[W]e review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty

beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding." (*People v. Albillar* (2010) 51 Cal.4th 47, 60.)

In order to be found guilty of the crime of rape in concert, a defendant must, "voluntarily acting in concert with another person," commit the crime of rape "by force or violence and against the will of the victim." (§ 264.1.) He may do so "either personally or by aiding and abetting the other person." (*Ibid*.)

One who aids and abets another in the commission of a crime is guilty of the crime, even if the other commits some or all of the acts constituting the crime. (§ 31; *People v. McCoy* (2001) 25 Cal.4th 1111, 1117.) Liability as an aider and abettor attaches if the defendant knew the perpetrator intended to commit the crime and the defendant intended to, and did, encourage or facilitate the perpetrator in committing the crime. (*People v. Beeman* (1984) 35 Cal.3d 547, 561; *People v. Keovilayphone* (2005) 132 Cal.App.4th 491, 497.) Whether a defendant aided and abetted the commission of a crime is a question of fact that may be proved by circumstantial evidence (*Beeman,* at pp. 559-560; *People v. Pitts* (1990) 223 Cal.App.3d 606, 892-893); and on appeal we must resolve all conflicts in the evidence and draw all reasonable inferences in support of the judgment. (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409.) "Among the factors which may be considered in determining aiding and abetting are: presence at the crime scene, companionship, and conduct before and after the offense." (*In re Juan G.* (2003)

112 Cal.App.4th 1, 5.) Other relevant factors include the defendant's failure to take steps to prevent the crime and flight from the crime scene. (*People v. Jones* (1980) 108 Cal.App.3d 9, 15.)

Applying these factors, we conclude there was sufficient evidence from which the jury reasonably could infer Sellers committed rape in concert in both ways defined by the statute. First, he personally raped H.P. as shown by evidence that the condom was found near where Sellers was arrested. The condom tested positive for Chheuni's and H.P.'s DNA. Sellers admitted he had had sex with Chheuni the previous night. The lab technician explained this likely accounted for her DNA inside the condom. Sellers's forcible sexual intercourse with H.P. would explain her DNA appearing on the outside of the condom. H.P. testified two different men had raped her, and she could tell them apart by their voices, ethnicity, and different penis sizes. The second man, who the jury could reasonably infer was Sellers, slapped her and ignored her plea to stop hurting her. Such testimony satisfied section 261, subdivision (a)(2)'s definition of rape as an act of sexual intercourse accomplished against a person's will by force or violence.

Second, the jury could infer Sellers committed rape in concert by aiding and abetting Tommy. Sellers testified he had heard H.P. screaming, and later pleading with Tommy not to hurt her. Nevertheless, according to Sellers's own account, Sellers did nothing to investigate how H.P. was being hurt, and much less help her. Rather, Sellers claimed, he opted to guard the other victims while Tommy was with H.P. In so doing, Sellers prevented anyone else from helping H.P. and thereby assisted Tommy in carrying out the rape. (See *In re Juan G., supra,* 112 Cal.App.4th at p. 5 [presence at the crime

scene is one factor relevant to aiding and abetting]; *People v. Jones, supra,* 108 Cal.App.3d at p. 15 [failure to prevent the crime is a factor in determining aiding and abetting].) The jury was instructed it could infer consciousness of guilt from the fact Sellers had lied to police (CALCRIM No. 362) and fled the crime scene (CALCRIM No. 372).

We note that Sellers, in the context of his claim regarding instructional error, concedes the jury could have concluded that sufficient evidence supported the rape conviction: "Although there may have been sufficient circumstantial evidence to support [his] convictions, sufficiency of the evidence is not the standard of review for federal constitutional error. Rather, respondent must demonstrate, beyond a reasonable doubt, that this jury surely would have found appellant guilty absent the error."

II.

Sellers contends the trial court's instructions regarding rape in concert failed to inform the jury that an aider and abettor can be guilty of a lesser crime than the direct perpetrator. He adds, "The modified jury instructions read by the court in response to the jury's question did not inform the jury properly on the specific intent required for an aider and abettor to commit the crime of rape in concert."[7] Finally, he contends with respect to

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[7] During deliberations, the jury asked the court a question regarding aiding and abetting: "In regards to counts 20-24, [two counts of making a criminal threat (§ 422), two counts of forcible rape (§ 261 subd. (a)(2)), and one count of forcible rape while acting in concert (§§ 261 subd. (a)(2), 264.1)] can the defendant be found guilty of all those charges if we assume [two] separate rapists (i.e. by aiding and abetting one of the rapes)? This would be separate from acting in concert." The court responded by referring the jury to CALCRIM Nos. 400-402 regarding aiding and abetting.

CALCRIM No. 1001, "The jury was permitted to find [him] guilty by an instruction that essentially omitted an essential element of secondary criminal liability, namely, the omission of the statutory requirement that one both aid *and* abet the perpetrator in order to be an aider and abettor."

Without objection, the court instructed regarding aiding and abetting with CALCRIM Nos. 400 and 401. The court instructed the jury with the 2009 version of CALCRIM No. 400 as follows: "A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime. [¶] A person is *equally guilty* of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it." (Italics added.)[8]

The court instructed the jury with the CALCRIM No. 401 standard instruction: "To prove that a defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; [¶] And [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime. [¶] Someone *aids* and

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8 The 2010 revised CALCRIM No. 400 states in the last sentence of the first paragraph that: "A person is guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator . . . ," deleting the word "equally" found in the 2009 version.

abets a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime. [¶] If all of these requirements are proved, a defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor. If you conclude a defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether that defendant was an aider and abettor. [¶] However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor."

The court also instructed with CALCRIM No. 402 regarding natural and probable consequences of the target offenses of robbery and burglary, and the nontarget offenses of assault with caustic chemicals and making criminal threats.[9]

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9 Specifically, the court instructed with the language of CALCRIM No. 402:

"The defendants are charged in counts 4 through 8 with robbery perpetrated in an inhabited residence and in count 9 with residential burglary. These offenses are referred to hereafter as the 'target offenses.' Each of these counts is a 'target offense' for purposes of the following instructions. The defendants are charged in counts 10 through 14 with assault with caustic chemicals and in counts 15 through 19 with criminal threats.

"You must first decide whether a defendant is guilty of one or more of the target offenses, that is, robbery perpetrated in an inhabited residence or residential burglary. If you find that a defendant is guilty of any of the target offenses, you must then decide whether he or she is guilty of any of the crimes charged in counts 10 through 14, assault with caustic chemicals, and in counts 15 through 19, criminal threats.

"Under certain circumstances, a person who is guilty of one crime may also be guilty of other crimes that were committed at the same time.

"To prove that a defendant is guilty of any of the crimes charged in counts 10 through 14, assault with caustic chemicals, and in counts 15 though 19, criminal threats, the People must prove that:

"1. The defendant is guilty of one or more of the target offenses;

The court instructed the jury with CALCRIM No. 1001 regarding rape in concert: "The defendant, KEVIN KEITH SELLERS, JR., is charged in Count Twenty-Four with committing rape by acting in concert with TOMMY NGUYEN. [¶] To prove that a defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant personally committed forcible rape and voluntarily acted with someone else who aided and abetted its commission; [¶] OR [¶] 2. The defendant voluntarily aided and abetted someone else who personally committed forcible rape. [¶] To decide whether the defendant or TOMMY NGUYEN committed rape, please refer to the separate instructions that I (will give/have given) you on that crime. To decide whether the defendant or TOMMY NGUYEN aided and abetted rape, please refer to the separate instructions that I (will give/have given) you on aiding and abetting. You must apply those instructions when you decide whether the People have proved rape in concert. [¶]

"2. During the commission of the target offense a co-participant in that target offense committed one or more of the offenses charged in counts 10 through 14, assault with caustic chemicals, and in counts 15 through 19, criminal threats; AND

"3. Under all the circumstances, a reasonable person in the defendant's position would have known that the commission of the offense charged in counts 10 through 14, assault with caustic chemicals, and in counts 15 through 19, criminal threats, was a natural and probable consequence of the target offense.

"A *co-participant* in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander.

"A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. If any of the crimes charged in counts 10 through 14, assault with caustic chemicals, and in counts 15 through 19, criminal threats, was committed for a reason independent of the common plan to commit one or more of the target offenses, then the commission of that crime was not a natural and probable consequence of the target offense.

"To decide whether the crimes alleged in counts 10 through 14, assault with caustic chemicals, and in counts 15 through 19, criminal threats, [were committed] please refer to the separate instructions that I will give you on those crimes."

To prove the crime of rape in concert, the People do not have to prove a prearranged plan or scheme to commit rape."

Initially, it appears this claim has been forfeited because, as Sellers concedes, he failed to suggest the trial court modify any of the standard jury instructions regarding aiding and abetting. (*People v. Hudson* (2006) 38 Cal.4th 1002, 1011-1012 [" 'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language' "].) However, even if, as Sellers claims, his substantial rights were implicated and he was not required to object at trial (*People v. Salcido* (2008) 44 Cal.4th 93, 155), his claim fails on the merits.

"We review defendant's claims of instructional error de novo. [Citation.] 'In conducting this review, we first ascertain the relevant law and then "determine the meaning of the instructions in this regard." [Citation.] [¶] . . . " 'In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given. [Citation.]' " [Citation.] "Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation." ' " (*People v. Johnson* (2009) 180 Cal.App.4th 702, 707; *People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.)

"When considering a challenge to a jury instruction, we do not view the instruction in artificial isolation but rather in the context of the overall charge. [Citation.]

For ambiguous instructions, the test is whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction." (*People v. Mayfield* (1997) 14 Cal.4th 668, 777; *People v. Young* (2005) 34 Cal.4th 1149, 1202.) In making this determination, we "must consider the arguments of counsel in assessing the probable impact of the instruction on the jury." (*People v. Young*, *supra*, at p. 1202.)

In light of the totality of the court's instructions and the argument of defense counsel, we conclude the jury was not reasonably likely to misinterpret the court's instructions regarding aiding and abetting. The jury was fully apprised of Sellers's role in the rape, in comparison to Tommy's role. Consequently, the jury acquitted him of those rape charges involving Tommy. As noted, the evidence showed Sellers committed rape in concert in two different ways, that is, by personally raping H.P., and aiding and abetting Tommy. Sellers was aware H.P. was tied, blindfolded, and threatened with bodily harm. Sellers did not call police to assist H.P. or allow her to escape, and he did not attempt to dissuade his coparticipants, despite hearing H.P.'s scream and pleas to Tommy not to hurt her. On this record, any instructional error was harmless beyond a reasonable doubt because the overwhelming evidence established that Sellers committed rape in concert with Tommy.

III.

Sellers contends the trial court erroneously denied his motion for new trial brought on grounds of juror misconduct.

During trial, defense counsel informed the court and the parties that during a break, Sellers's stepfather had heard a female juror say something to the effect of, " 'but

the condom was there . . . but the condom was there.' " In response to the court's request on how to proceed, defense counsel suggested Sellers's stepfather could recount on the record what he had heard; next, the court could interview individual jurors regarding the statement that was overheard. The court told defense counsel, "I'm happy to accept your proffer as to what [Sellers's stepfather] told you." The court proceeded to individually interview the jurors and alternates, but all denied knowing about the statement regarding the condom. The court noted that numerous jurors had been in the hallway when the comment was overheard and, in the nearby courtrooms, cases on trial involved a sexually violent predator and, separately, lewd acts under section 288.

Defense counsel reserved the right to move for a mistrial. The court responded, "I think it was appropriate . . . to conduct this inquiry [] because this remark did seem . . . to have a remarkable specificity with this case. . . . I have no evidence, however, that any of these jurors heard it. [¶] And if there was one who perhaps heard or said it, I think that the message [h]as been effectively communicated that that kind of conduct is not to be repeated and that it's not to be considered during deliberations. I also have reasonable confidence that if any juror mentioned something like that during deliberations, the other jurors would be in a position to police that conduct." The court encouraged defense counsel to report any further concrete information he might obtain regarding the comment Sellers's stepfather had overheard.

Sellers moved for new trial on grounds of juror misconduct, but the court denied the motion, ruling it had interviewed each juror individually, and admonished them not to consider evidence heard outside of trial. It concluded, "So I don't think that there was

any issue of jury misconduct. There was not any evidence that these jurors had engaged in any kind of juror misconduct."

For a juror to decide a case before it is submitted is misconduct. Accordingly, the court's further inquiry was reasonable. (See *People v. Barnwell* (2007) 41 Cal.4th 1038, 1054 [juror note about possible juror misconduct due to bias against police officer testimony required the court to conduct a hearing].) Whether and how to investigate an allegation of juror misconduct falls within the court's discretion. (*People v. Alexander* (2010) 49 Cal.4th 846, 927.) Although a court should exercise caution to avoid threatening the sanctity of jury deliberations, it must hold a hearing when it learns of allegations which, if true, would constitute good cause for a juror's discharge. (*People v. Lomax* (2010) 49 Cal.4th 530, 588.) Failure to do so may be an abuse of discretion. (*Ibid.*) "In determining misconduct, '[w]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence.' " (*People v. Collins* (2010) 49 Cal.4th 175, 242.) We review independently whether those facts constitute misconduct. (*Ibid.*)

Sellers contends the trial court should have first allowed his stepfather to provide the court with an exact description of the juror and her statements, to enable the court to interview the jurors more in depth. He speculates, "It is reasonable to think that the juror who either said or heard the comment would be somewhat frightened at the prospect of being brought back into the court to discuss an issue of misconduct. They may have felt that they were 'in trouble' for something. [¶] The jurors' denial that [the court's inquiry

regarding possible misconduct affected them] could not be taken seriously as the nature of the discussion would tend them [*sic*] to experience unconscious bias."

We conclude the trial court did not err in resolving the claim of jury misconduct. It was not necessary for the court to give Sellers's stepfather an opportunity to address the court because the court assumed the truth of his claim he had overheard a juror's comment regarding the condom. The court interviewed each juror, and all denied hearing the comment. The court further instructed each juror not to rely on such comments. Substantial evidence supported the trial court's underlying factual findings establishing there was no jury misconduct; accordingly, the trial court did not err in denying Sellers's motion for a new trial.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

McDONALD, Acting P. J.

AARON, J.